

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Mar 30, 2022**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

NICHOLE K.,

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

No. 2:20-CV-0282-JAG

ORDER GRANTING  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 14, 15. Attorney Victoria B. Chhagan represents Nichole K. (Plaintiff); Special Assistant United States Attorney Erin F. Highland represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

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<sup>1</sup>Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

## JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits in October 2017 and an application for Supplemental Security Income in March 2019 alleging disability since August 25, 2016, due to Right Neck Pain, Right Shoulder Injury, Right Upper Extremity Pain, Chronic Migraines, Upper Back Pain, Lower Back Pain, Sleeping Disorder and Extreme Daytime Fatigue, Lower Extremity Sciatica, Anxiety and Depression, and Obesity. Tr. 189, 208, 225-226. The applications were denied initially and upon reconsideration. Administrative Law Judge (ALJ) C. Howard Prinsloo held a hearing on August 15, 2019, Tr. 34-77, and issued an unfavorable decision on September 16, 2019, Tr. 15-27. The Appeals Council denied Plaintiff's request for review on June 9, 2020. Tr. 1-6. The ALJ's September 2019 decision thus became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on August 13, 2020. ECF No. 1.

## STATEMENT OF FACTS

Plaintiff was born in 1973, Tr. 189, and was 42 years old on the alleged disability onset date, August 25, 2016, Tr. 226. She completed high school and had previously been licensed as a Certified Nursing Assistant (CNA). Tr. 54-57, 226. Plaintiff's disability report indicates she stopped working on August 25, 2016, because of her conditions. Tr. 225-226. Plaintiff testified at the administrative hearing that she stopped working in August of 2016 because she had a difficult time standing and performing the repetitive actions of a cashier. Tr. 41.

Plaintiff testified she had right shoulder pain and migraine headaches, but shoulder surgery initially provided relief for those issues. Tr. 42-43. She stated, however, that she reinjured her shoulder working in her yard about three months following surgery. Tr. 43. Plaintiff also reported she had fibromyalgia, as diagnosed by a rheumatologist, and described the condition as chronic pain in her

1 back, hips, shoulder, and legs and fatigue. Tr. 46-49. With respect to her mental  
 2 health, Plaintiff indicated she was on medication for depression and anxiety.  
 3 Tr. 50-52.

#### 4 **STANDARD OF REVIEW**

5 The ALJ is responsible for determining credibility, resolving conflicts in  
 6 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
 7 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with  
 8 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
 9 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
 10 only if it is not supported by substantial evidence or if it is based on legal error.  
 11 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
 12 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
 13 1098. Put another way, substantial evidence is such relevant evidence as a  
 14 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
 15 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
 16 rational interpretation, the Court may not substitute its judgment for that of the  
 17 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
 18 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
 19 administrative findings, or if conflicting evidence supports a finding of either  
 20 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
 21 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
 22 supported by substantial evidence will be set aside if the proper legal standards  
 23 were not applied in weighing the evidence and making the decision. *Browner v.*  
 24 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988)

#### 25 **SEQUENTIAL EVALUATION PROCESS**

26 The Commissioner has established a five-step sequential evaluation process  
 27 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*  
 28 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant

bears the burden of establishing a prima facie case of disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) the claimant can make an adjustment to other work; and (2) the claimant can perform specific jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If a claimant cannot make an adjustment to other work in the national economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

#### ADMINISTRATIVE DECISION

On September 16, 2019, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since August 25, 2016, the alleged disability onset date. Tr. 17.

At step two, the ALJ determined Plaintiff had the following severe impairments: obesity, degenerative joint disease, and migraines. Tr. 17.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. Tr. 20.

The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found Plaintiff could perform light exertion level work with the following limitations: she can occasionally climb ladders, ropes, and scaffolds; she is limited to occasional use of the right upper extremity to reach overhead occasionally; she can occasionally reach in front or laterally and push and pull occasionally; and she must avoid concentrated exposure to extreme cold or excessive vibration or hazards. Tr. 20.

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1 At step four, the ALJ found Plaintiff was unable to perform her past relevant  
2 work. Tr. 25.

3 At step five, the ALJ determined that, based on the testimony of the  
4 vocational expert, and considering Plaintiff's age, education, work experience, and  
5 RFC, Plaintiff was capable of making a successful adjustment to other work that  
6 exists in significant numbers in the national economy, including the jobs of  
7 furniture rental consultant, investigator of dealer accounts, and usher. Tr. 26-27.

8 The ALJ thus concluded Plaintiff was not under a disability within the  
9 meaning of the Social Security Act at any time from August 25, 2016, the alleged  
10 onset date, through the date of the ALJ's decision, September 16, 2019. Tr. 27.

### 11 ISSUES

12 The question presented is whether substantial evidence supports the ALJ's  
13 decision denying benefits and, if so, whether that decision is based on proper legal  
14 standards.

15 Plaintiff asserts the following issues for the Court's review:

- 16 (1) the ALJ erroneously found Plaintiff's fibromyalgia, as diagnosed by  
17 rheumatologist James Byrd, M.D., was not a medically determinable  
18 impairment;
- 19 (2) the ALJ erred by finding Plaintiff did not have any severe mental  
20 impairments; and
- 21 (3) the ALJ failed to meet his step five burden of showing there were jobs  
22 in the national economy that Plaintiff could perform.

23 ECF No. 14 at 1-2.

### 24 DISCUSSION

#### 25 A. James Byrd, M.D.

26 Plaintiff's first contention is that the ALJ erred by rejecting the April 5, 2019  
27 assessment of rheumatologist James Byrd, M.D. ECF No. 14 at 3-7. Defendant

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1  
2 responds that the ALJ reasonably determined Dr. Byrd's opinion was  
3 unpersuasive. ECF No. 15 at 6-8.

4 For claims filed on or after March 27, 2017, new regulations apply that  
5 change the framework for how an ALJ must weigh medical opinion evidence.  
6 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL  
7 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new  
8 regulations provide the ALJ will no longer give any specific evidentiary weight to  
9 medical opinions or prior administrative medical findings, including those from  
10 treating medical sources. 20 C.F.R. § 416.920c(a). Instead, the ALJ will consider  
11 the persuasiveness of each medical opinion and prior administrative medical  
12 finding, regardless of whether the medical source is an acceptable medical source.  
13 20 C.F.R. § 416.920c(c).

14 The ALJ is required to consider multiple factors, including supportability,  
15 consistency, the source's relationship with the claimant, any specialization of the  
16 source, and other factors (such as the source's familiarity with other evidence in  
17 the file or an understanding of Social Security's disability program). *Id.* The  
18 regulations make clear that the supportability and consistency of the opinion are  
19 the most important factors, and the ALJ must articulate how he considered those  
20 factors in determining the persuasiveness of each medical opinion or prior  
21 administrative medical finding. 20 C.F.R. § 416.920a(b). The ALJ may explain  
22 how he considered the other factors, but the ALJ is not required to except in cases  
23 where two or more opinions are equally well-supported and consistent with the  
24 record. *Id.*

25 Supportability and consistency are further explained in the regulations as  
26 follows:

27 (1) *Supportability*. The more relevant the objective medical evidence  
28 and supporting explanations presented by a medical source are to

1 support his or her medical opinion(s) or prior administrative medical  
2 finding(s), the more persuasive the medical opinions or prior  
3 administrative medical finding(s) will be.

4 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
5 administrative medical finding(s) is with the evidence from other  
6 medical sources and nonmedical sources in the claim, the more  
7 persuasive the medical opinion(s) or prior administrative medical  
8 finding(s) will be.

20 C.F.R. § 416.920c(c).

9 On April 5, 2019, Dr. Byrd filled out a “medical report” on behalf of  
10 Plaintiff’s attorney, Tr. 768, indicating Plaintiff had been diagnosed with  
11 fibromyalgia characterized as chronic widespread pain with greater than 11 tender  
12 points, would need to lie down 30 to 60 minutes every four hours during the day,  
13 would miss on average four or more days of work per month, and was restricted to  
14 sedentary exertion level work, Tr. 769-770. He opined work on a regular and  
15 continuous basis would cause Plaintiff’s condition to deteriorate and explained  
16 “she reports work makes her worse.” Tr. 769. Dr. Byrd checked a box on the form  
17 indicating Plaintiff’s limitations had existed since at least August 2016. Tr. 770.

18 The ALJ did not find the opinion of Dr. Byrd persuasive, noting it was not  
19 supported by his examination records and not consistent with Plaintiff’s level of  
20 activity reflected in the record. Tr. 24.

21 With respect to supportability, although the medical record contains a  
22 September 2017 report of “possible” fibromyalgia, Tr. 484, there is no firm  
23 diagnosis of fibromyalgia until the April 2019 report of Dr. Byrd, Tr. 1023. Dr.  
24 Byrd’s opinion that Plaintiff’s limitations from fibromyalgia have existed since  
25 August 2016 is thus not supported. In addition, there is no evidence Plaintiff met  
26 the durational requirement for fibromyalgia as of the ALJ’s September 2019  
27 decision. *See* 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (an individual shall be  
28 considered disabled if she has an impairment which can be expected to result in



1 death or which has lasted or can be expected to last for a continuous period of not  
2 less than 12 months). Furthermore, as noted by the ALJ, Plaintiff's January 2019  
3 examination with Dr. Byrd revealed normal range of motion with handgrip, wrists,  
4 elbow, shoulder, hip and knee, and Dr. Byrd diagnosed polyarthralgia, not  
5 fibromyalgia. Tr. 18, 24, 997.

6 As to consistency, the ALJ noted Dr. Byrd's restrictions were inconsistent  
7 with Plaintiff's activity level during the relevant time period. Tr. 24. The ALJ  
8 noted evidence from May 30, 2019 showed Plaintiff reported she was walking one  
9 to two miles every other day, Tr. 1049, and evidence that Plaintiff traveled to  
10 South Dakota and had moved a 100-pound item on at least one occasion, Tr. 383.  
11 Tr. 24. The ALJ found other medical professionals who opined Plaintiff was  
12 capable of performing a range of light and medium exertion level work were more  
13 persuasive. Tr. 24-25 citing Tr. 89-90, 105-107.

14 The Court finds the ALJ provided sufficient rationale for finding the April 5,  
15 2019 "medical report" of Dr. Byrd unpersuasive. Consequently, the ALJ did not  
16 err in finding fibromyalgia was not a medically determinable impairment or  
17 concluding Plaintiff was capable of performing a restricted range of light exertion  
18 level work.

## 19 **B. Mental Impairments**

20 Plaintiff next argues the ALJ erred by failing to find Plaintiff had severe  
21 mental impairments. ECF No. 14 at 7-14. Plaintiff specifically contends the ALJ  
22 erred by rejecting, without providing specific and legitimate reasons, the December  
23 2018 report of Thomas Genthe, Ph.D., which assessed marked psychological  
24 limitations. ECF No. 14 at 9-10.

25 Defendant responds that the ALJ reasonably determined Dr. Genthe's  
26 opinion was unpersuasive. ECF No. 15 at 6-8.

27 On December 14, 2018, Dr. Genthe completed a psychological/psychiatric  
28 evaluation of Plaintiff. Tr. 774-782. Dr. Genthe noted no records were provided



1 for review and Plaintiff's claimed symptoms were as follows: "I get migraine  
2 headaches and I have a shoulder injury that I had surgery on, my feet go numb, I  
3 have arthritis." Tr. 774. Dr. Genthe's summary also indicates Plaintiff presented  
4 with "primary medical claims as the reasons why she was not currently employed."  
5 Tr. 777.

6 Dr. Genthe performed a clinical interview; diagnosed Major Depressive  
7 Disorder, with anxious distress, Social Anxiety Disorder, and Other Specified  
8 Personality Disorder (with borderline features); and assessed Plaintiff's ability to  
9 maintain appropriate behavior in a work setting and complete a normal work day  
10 and work week without interruptions from psychologically based symptoms as  
11 markedly impaired. Tr. 776-777. He rated Plaintiff's overall severity as  
12 "marked." Tr. 777. However, all categories of Dr. Genthe's mental status  
13 examination were found to be within normal limits. *See* Tr. 778-779.

14 The ALJ determined Dr. Genthe's December 2018 opinion was  
15 unpersuasive.<sup>2</sup> Tr. 25. The ALJ indicated the opinion was unsupported as Dr.  
16 Genthe reviewed no records, he relied on Plaintiff's self-report, and the mental  
17 status exam was mostly normal. Tr. 25. The ALJ also found the opinion was  
18 inconsistent with Plaintiff's claim of physical health, rather than mental health, as  
19 her primary barrier to working and Plaintiff's stable mental health on medication.  
20 Tr. 25.

21 Regarding supportability, Dr. Genthe noted no records were provided for his  
22 review, Tr. 774, and, as observed by the ALJ, Dr. Genthe's mental status  
23 examination was mostly normal, Tr. 778-779. Tr. 25. Therefore, it was reasonable  
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25 <sup>2</sup>As noted by Defendant, ECF No. 15 at 8, although the ALJ first stated the  
26 opinion was "persuasive," Tr. 25, it is apparent from a plain reading of the analysis  
27 of Dr. Genthe's opinion and ultimate conclusion by the ALJ that this was a  
28 scrivener's error.

1 for the ALJ to find Dr. Genthe relied primarily on Plaintiff's non-credible self-  
2 reports. Tr. 25; *see Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (a  
3 physician's opinion may be disregarded when it is premised on the properly  
4 rejected subjective complaints of Plaintiff).

5 As to consistency, the ALJ noted Plaintiff has primarily indicated her  
6 physical problems, rather than mental health symptoms, prevented her from  
7 working. Tr. 25, 774, 777. Other than Plaintiff's report of a depressed mood,  
8 Tr. 778, Dr. Genthe's mental status exam findings were largely normal, Tr.  
9 778-779, yet the report rated Plaintiff's overall severity as marked, Tr. 777. The  
10 ALJ also noted Dr. Genthe's findings were inconsistent with other medical  
11 professionals of record, found persuasive by the ALJ, Tr. 25, who determined  
12 Plaintiff's mental health symptoms were mild and stable, *see* Tr. 86, 102-103.  
13 Finally, the ALJ noted the record shows Plaintiff's mental health was stable on  
14 medications. Tr. 25; *see* Tr. 473 (Plaintiff reported doing well on current regimen),  
15 1084 (mild depression noted as stable with mediation), 1301 (mild recurrent major  
16 depression noted as stable on medication).

17 The Court finds the ALJ provided sufficient rationale for finding Dr.  
18 Genthe's December 2018 opinion unpersuasive. Without taking into consideration  
19 Dr. Genthe's opinion of marked mental limitations, the substantial weight of the  
20 medical evidence fails to demonstrate Plaintiff had a severe medically  
21 determinable mental impairment during the relevant time period. The ALJ's step  
22 two determination is thus without error.

### 23 **C. Step Five**

24 Plaintiff contends the ALJ also erred at Step Five because the jobs identified  
25 by the vocational expert would be eliminated if the ALJ's RFC determination  
26 reflected Plaintiff's mental limitations. ECF No. 14 at 13-20.

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1 At Step Five, “the Commissioner has the burden ‘to identify specific jobs  
2 existing in substantial numbers in the national economy that [a] claimant can  
3 perform despite [his] identified limitations.’” *Zavalin v. Colvin*, 778 F.3d 842, 845  
4 (9th Cir. 2015) (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995)).  
5 The Commissioner considers the claimant’s RFC, age, education, and work  
6 experience in order to determine if the claimant is able to perform a job in the  
7 national economy. 20 C.F.R. § 416.920(a). The ALJ may also rely on the  
8 testimony of a vocational expert for information on what occupations a claimant  
9 can perform given his or her RFC. 20 C.F.R. § 416.966(e); *Valentine v. Comm’r*  
10 *Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

11 Plaintiff has not demonstrated that the ALJ erred with respect to his analysis  
12 of the medical opinion evidence of record or that the ALJ’s RFC determination  
13 lacks support. *See supra*. The Court finds the ALJ’s RFC determination is  
14 supported by substantial evidence in this case.

15 At the administrative hearing, the vocational expert testified that with the  
16 RFC assessed by the ALJ, Plaintiff retained the capacity to perform a significant  
17 number of jobs existing in the national economy, including the positions of  
18 furniture rental consultant, investigator of dealer accounts, and usher. Tr. 64-66.  
19 Since the vocational expert’s testimony was based on a properly supported RFC  
20 determination by the ALJ, the Court finds the ALJ did not err at step five of the  
21 sequential evaluation process in this case. Tr. 26-27.

## 22 CONCLUSION

23 Having reviewed the record and the ALJ’s findings, the Court finds the  
24 ALJ’s decision is supported by substantial evidence and free of error.

25 Accordingly, **IT IS HEREBY ORDERED:**

26 1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is  
27 **GRANTED.**

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1           2.     Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.  
2           **IT IS SO ORDERED.** The District Court Executive is directed to file this  
3 Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall  
4 be entered for Defendant and the file shall be **CLOSED**.

5           DATED March 30, 2022.



  
JAMES A. GOEKE  
UNITED STATES MAGISTRATE JUDGE